PAYA TERUBONG ESTATES SDN BHD

v.

PUSAKA WARISAN SDN BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: P-02-708-1995]
18 MARCH 1998

LAND LAW: *Caveat - Application for removal - Serious question to be tried, whether the only consideration - Balance of justice or balance of convenience, whether must be considered - Whether caveator must bring and prosecute proceedings for specific performance timeously - Whether failure of trial judge to consider balance of justice fatal to his decision - Whether appellate court may disturb judge's primary exercise of discretion*

CIVIL PROCEDURE: *Appeal - Interference by appellate court - When may appellate court interfere with judge's primary exercise of discretion - Whether judge failed to take into account relevant considerations - Whether appellate court may exercise its own discretion therefor - Application for removal of caveat*

This was the appellant's appeal against the order of the High Court dismissing its application to remove the respondent's caveat. The appellant had entered into an agreement ('the agreement') with the respondent for the sale of certain lots of land ('the land') to the latter on 25 July 1989. The agreement did not, however, stipulate the date by which the completion of the sale was to take place. On 20 August 1989, the respondent entered a private caveat against the registered document of titles to the land. On 9 November 1994, the appellant gave notice to the respondent to complete the sale and purchase of the land within three months, ie, by 8 February 1995. The respondent replied on 7 February 1995 proposing, instead, to complete the sale and purchase of the land within four months of the appellant's notice. The appellant replied on 20 February 1995 declining the proposal and called upon the respondent to remove the caveat. The respondent refused to remove the caveat but, nevertheless, did not commence any proceedings for the specific enforcement of the agreement. On 29 March 1995, the appellant took out an originating motion seeking the removal of the respondent's caveat. The learned judge dismissed the motion on the ground that there were serious questions to be tried.

Held:
Per Gopal Sri Ram JCA

[1] The learned judge, after having held that there were serious questions to be tried, did not go on to consider whether the balance of justice laid in favour of the caveat remaining on the register or whether it favoured its removal. The learned judge had not considered the absence of any steps taken by the respondent to enforce its contractual rights; he did not appreciate that there was no 'matter to be tried' as no action had been commenced by the respondent.

[2] Although there was a caveatable interest and the matters put in issue at the caveat proceedings did raise serious questions to be tried, yet the caveat could not be permitted to remain on the register because the respondent had not timeously commenced proceedings for specific relief. Even as at the date of the instant appeal, no action was ever commenced by the respondent. It is crucial that the caveator brings and prosecutes proceedings for specific performance **timeously**. [*Eng Mee Yong & Ors v. Letchumanan*]

[3] The issue as to where the **balance of justice** lies is a most relevant consideration when determining whether a caveat ought to be permitted to remain on the register and fetter the right of the registered proprietor to deal with his land. In the present case, the failure of the learned judge to address his mind to this vital consideration (the balance of justice) had fatally flawed the conclusion at which he arrived.

[4] An appellate court possessing no original discretion in respect of a certain matter is usually reluctant to disturb a judge's primary exercise of discretion. However, where it is amply demonstrated that the judge in whom the primary discretion in vested has failed to take into account relevant considerations, it is the duty of the Court of Appeal to say so and to intervene and set matters right by an exercise of its own discretion.

[Appeal allowed; removal of caveat ordered.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Ini adalah rayuan perayu terhadap perintah Mahkamah Tinggi yang menolak permohonannya untuk membatalkan kaveat responden. Perayu telah memasuki satu perjanjian ('perjanjian tersebut') dengan responden bagi penjualan beberapa lot tanah tertentu ('tanah tersebut')kepada pihak yang terkemudian pada 25 Julai 1989. Perjanjian tersebut, walaubagaimanapun, tidak menetapkan tarikh

melalui yang mana penyiapan penjualan tersebut seharusnya berlaku. Pada 20 Ogos 1989 responden telah memasuki satu kaveat persendirian terhadap dokumen hakmilik berdaftar kepada tanah tersebut. Pada bulan November 1994, perayu telah memberi notis kepasa responden untuk menyiapkan penjualan dan pembelian tanah tersebut dalam tempoh tiga bulan, iaitu, selewat-lewatnya pada 8 Februari 1995. Responden telah menjawab pada 7 Februari 1995 mencadangkan, sebaliknya, untuk menyiapkan penjualan dan pembelian tanah tersebut dalam tempoh empat bulan dari notis perayu. Perayu telah menjawab pada 20 Februari 1995 menolak cadangan itu dan meminta responden membatalkan kaveat tersebut. Responden enggan untuk membatalkan kaveat tersebut tetapi, namun begitu, tidak memulakan sebarang prosiding untuk penguatkuasaan spesifik perjanjian tersebut. Pada 29 Mac 1995, perayu telah mengeluarkan satu usul pemula yang cuba untuk membatalkan kaveat responden. Hakim yang bijaksana telah menolak usul tersebut atas alasan bahawa terdapatnya persoalan yang serius untuk dibicarakan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Hakim yang bijaksana, selepas memutuskan bahawa terdapatnya persoalan-persoalan serius untuk dibicarakan, tidak seterusnya mempertimbangkan sama ada imbangan keadilan yang dibentangkan memihak kepada kaveat dikekalkan pada daftar atau sama ada ianya memihak kepada pembatalan kaveat tersebut. Hakim yang bijaksana telah tidak mempertimbangkan ketiadaan apa-apa langkah yang diambil oleh responden bagi menguatkuasakan hak kontraktualnya; beliau tidak menghargai bahawa tidak terdapatnya "perkara untuk dibicarakan" kerana tiada tindakan telah dimulakan oleh responden.

[2] Walaupun terdapatnya kepentingan yang boleh dikaveatkan dan perkara-perkara yang diketengahkan sebagai isu di prosiding kaveat tersebut telah membangkitkan persoalan-persoalan yang serius, namun begitu kaveat tersebut tidak boleh dibenarkan kekal pada daftar tersebut kerana responden telah tidak memulakan prosiding untuk relief sepesifik tepat pada masanya. Walaupun sepertimana pada tarikh rayuan semasa ini, tiada tindakan pernah dimulakan oleh responden. Adalah amat penting bahawa pengkaveat memulakan dan membuat prosiding bagi mendakwa untuk mendapatkan perlaksanaan spesifik tepat padamasanya [*Eng Mee Yong & Ors v. Letchumanan]*

[3] Isu mengenai di manakah terdapatnya **imbangan keadilan** adalah suatu pertimbangan yang paling relevan ketika memutuskan sama ada sesuatu kaveat seharusnya dibenarkan untuk kekal pada daftar dan mengikat hak tuanpunya berdaftar supaya berususan dengan tanahnya. Dalam kes semasa ini, kegagalan hakim yang bijaksana untuk memikirkan pertimbangan yang penting ini (imbangan keadilan) telah amat mencacatkan keputusan yang telah beliau capai.

[4] Sesebuah mahkamah rayuan yang tidak mempunyai budibicara asal berhubung dengan sesuatu perkara tertentu selalunya berasa ragu-ragu untuk menggangui perlaksanaan budibicara utama seseorang hakim. Walaubagaimanapun, di mana ianya ditunjukkan dengan secukupnya bahawa hakim kepada siapa budibicara utama itu diletakhak telah gagal untuk mengambilkira pertimbangan-pertimbangan yang relevan, maka ianya merupakan tugas atau kewajipan Mahkamah Yang Mulia untuk menyatakan sedemikian dan untuk mencampuri serta memperbetulkan keadaan dengan melaksanakan budibicaranya yang tersendiri.

[Rayuan dibenarkan; pembatalan kaveat telah diperintahkan.]

Cases referred to:

Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 ***(foll)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 2 CLJ 713, [1995] 3 CLJ 520 ***(cit)***

Murugappa Chettiar Lakshmanan v. Lee Teck Mook [1995] 1 CLJ 545 ***(foll)***

Teoh Ai Choo v. Leong Sze Hian [1982] 2 MLJ 12 ***(refd)***

For the appellant - Jannu Babjan; M/s Lim Cheng Poh, Lim & Rahim

For the respondent - Ganesh Ponniah; M/s Geh Cheng Lok & Co

[Appeal from High Court, Pulau Pinang; Originating Motion No: 25-25-95]

Reported by Alex KC Lee

JUDGMENT

Gopal Sri Ram JCA:

This appeal, directed against the order of the High Court at Penang, refusing the appellant's application to remove the respondent's caveat raises a short but important point. The brief facts relevant to the appeal are as follows.

The appellant is the registered proprietor of all those lands held under Lots 3440 and 3441, Mukim 13, Daerah Timor Laut, Penang ('the subject land'). On 25 July 1989, the appellant, as vendor, entered into a written agreement of sale with the respondent under the terms of which the former agreed to

sell to the latter the subject land and one other lot at a price of RM26,000 per acre. The agreement did not stipulate the date on which completion was to take place. The sale and purchase of the third lot was completed and it does not form the subject matter of the present litigation. On 20 August 1989 the respondent entered a private caveat against the registered document of titles to the subject land.

By a letter dated 9 November 1994, the appellant's solicitors gave the respondent notice to complete the sale and purchase of the subject lands within three months, that is to say, not later than 8 February 1995. The reply to the appellant's letter did not come until 7 February 1995 when the respondent's solicitors wrote to say that their client intended to effect completion by making payment of the full purchase price within four months from the date of the letter. On 20 February 1995, the appellant wrote through its solicitors stating that it did not agree to the respondent's proposal. This letter also called upon the respondent to remove its caveat. The respondent did not, however, remove the caveat. Neither did it commence any proceedings for the specific enforcement of the sale and purchase agreement in question.

Thereafter the appellant took out an originating motion on 29 March 1995 seeking an order for the removal of the respondent's caveat. The learned judge who heard the application, after a careful analysis of the evidence placed before him, refused it principally on the ground that there were serious questions to be tried. Having so held, he did not, however, go on to consider whether the balance of justice lay in favour of the caveat remaining on the register or whether it favoured the removal of the restraint. In particular, it does not appear from his judgment that he took into account the absence of any steps taken by the respondent to enforce its contractual rights. All he said was that the *status quo* ought to be proceeded until the matter is tried. However, he does not appear to have appreciated, sufficiently or at all, that there was no "matter to be tried" because no action had been commenced by the respondent.

Before us, counsel for the appellant properly conceded that there was a caveatable interest and that the matters put in issue during the caveat proceedings did raise serious questions to be tried. She however argued that the learned judge had erred in failing to consider the balance of convenience. She submitted that the caveat could not be permitted to remain on the register because the respondent had not timeously commenced proceedings for specific relief. Counsel also drew our attention to the fact that no action had been instituted even as at the date of hearing of this appeal.

We are of the view that there is merit in these arguments and that they are supported by authority. In *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212, 215 Lord Diplock said:

> In the case of a refusal by the vendor to complete a contract for the sale of land the normal remedy of the purchaser as plaintiff in an action is an order for specific performance of the contract; and in the absence of special circumstances, if it were shown that the vendor threatened to dispose of the land while the action was still pending, the balance of convenience would be in favour of granting an interlocutory injunction to prevent his doing so, provided that the plaintiff would be in a position to satisfy his undertaking as to damages if the action should fail at trial. So too in an application by the caveator under s. 327 for removal of a caveat, once the caveatee has met the first requirement of satisfying the court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until **proceedings, brought and prosecuted timeously by the caveator,** for specific performance of the contract of sale which he alleges had been tried.

The importance of timeous institution and prosecution of proceedings in this area of the law is well brought out by the judgment of Sinnathuray J, in the Singapore High Court in *Teoh Ai Choo v. Leong Sze Hian* [1982] 2 MLJ 12. It is a brief judgment and merits reproduction here:

> The matter before me is a simple one. Mr KS Chung for the plaintiff has raised five serious points. I need only deal with the last one, the fifth point, that on the subject of delay.
>
> First, I accept the decision in *Plimmer Bros. v. St Maur* [1906] 26 NZLR 294. ln that case, Stout, CJ in New Zealand, on an application to remove a caveat, on facts similar to the present case, where the defendant had commenced no action against the plaintiff relating to the land in respect of which a caveat was lodged, referred to several reported cases and said:
>
> > It was his duty to commence an action promptly if he considered himself entitled to specific performance ...
> >
> > Here nothing was done for nearly sixteen months, and then a caveat was lodged. More than a month has elapsed since then, and still no action has been commenced. In my opinion an action for specific performance under such circumstances would be hopeless, and a caveat under such circumstances must be deemed vexatious ... in my opinion, to prevent a man dealing with his property after such a long delay is so inequitable that the court will not lend its assistance to such a proceeding.
>
> Next, there is a Singapore decision of the learned Chief Justice in OS No 192 of 1979 where he held that a delay of 2½ months was sufficient for a caveat to be removed forthwith.

> In this case on the facts before me I find that there has been inordinate and inexcusable delay. The dispute between the parties has arisen from an agreement for sale and purchase of a house in Serangoon Garden signed on 1 September 1979. It was not till 21 months later that a caveat was lodged on 11 June 1981. Then, from this date to the date of the hearing of this application on 7 May 1982, no action has been commenced by the defendant against the plaintiff in respect of the dispute, a lapse of 11 months. In these circumstances, having regard to the foregoing, on the ground of delay alone, the caveat must be removed forthwith.
>
> My decision is entirely on the caveat. There is nothing to prevent the defendant from commencing action against the plaintiff on the alleged claim of breach of trust.
>
> I made an order in terms of the originating summons with costs to the plaintiff. There was liberty to apply.

In the present instance the caveat has remained on the register since 20 August 1989. No doubt it was entered by the respondent initially to protect its interest pending the conveyance of title. Nevertheless, when it became clear in February 1995 that the appellant was not prepared to agree to extend the time limit it had imposed by its solicitors' letter of 9 November 1994, it was incumbent upon the respondent to commence proceedings to enforce what it perceived to be its rights under the contract in question. Yet, as earlier observed, no action was ever commenced by the respondent, even up to the date of hearing of this appeal. And no explanation whatsoever was forthcoming from the respondent for this failure. In these circumstances it would be an affront to justice to prevent the appellant from continuing to deal with the subject lands.

The approach to be adopted by a judge to whom an application is made for the removal of a caveat has been established by this court in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 1 MLJ 719 and *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 1 MLJ 782. In the latter case, this court said (at p. 788):

> The principles formulated in *Luggage Distributors* as applied to the present appeal require an investigation into the following matters. First, whether the respondent, on the material set out by him in his application under s. 323(1) of the Code, has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

In the case at hand the first two steps are academic by reason of the concession made by counsel for the appellant. We are here only concerned with the learned judge's failure to address his mind to the third step in the inquiry before him. The issue as to where the balance of justice lies is a most relevant consideration when determining whether a caveat ought to be permitted to remain upon the register and fetter the right of the appellant as registered proprietor to deal with the subject lands. In our judgment the failure of the judge to address his mind to this vital consideration has fatally flawed the conclusion at which he arrived.

Although the decision whether a caveat ought to remain on the register is a matter within the discretion of the judge, it is like all other discretionary matters one that is required to be exercised judicially. One can, of course, quite well appreciate an appellate court's reluctance to disturb the primary exercise of discretion. This is because a court of appeal in a matter such as the present does not possess an original discretion, its initial function being one of review only. However, where, as in the present instance, it is amply demonstrated that the judge in whom the primary discretion is vested has failed to take into account relevant considerations it is the duty of this court to say so and to intervene and set matters right by an exercise of its own discretion.

For the reasons given, we allowed the appeal and made an order directing the respondent's caveat to be removed forthwith. The appellant was given the costs of this appeal and those incurred in the court below. The deposit lodged in court was ordered to be refunded to the appellant.